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No. 452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

LETOURNEAU COMPANY OF GEORGIA.

PETITION FOR REHEARING.

ALONZO C. WHEELER,
NELSON T. HARTSON,
LESTER COHEN,
CLIFTON W. BRANNON,
C. M. MCCLURE,
Counsel for Respondent,
Letourneau Company of Georgia.

Of Counsel:
HOGAN & HARTSON,
810 Colorado Bldg.,
Washington, D. C.

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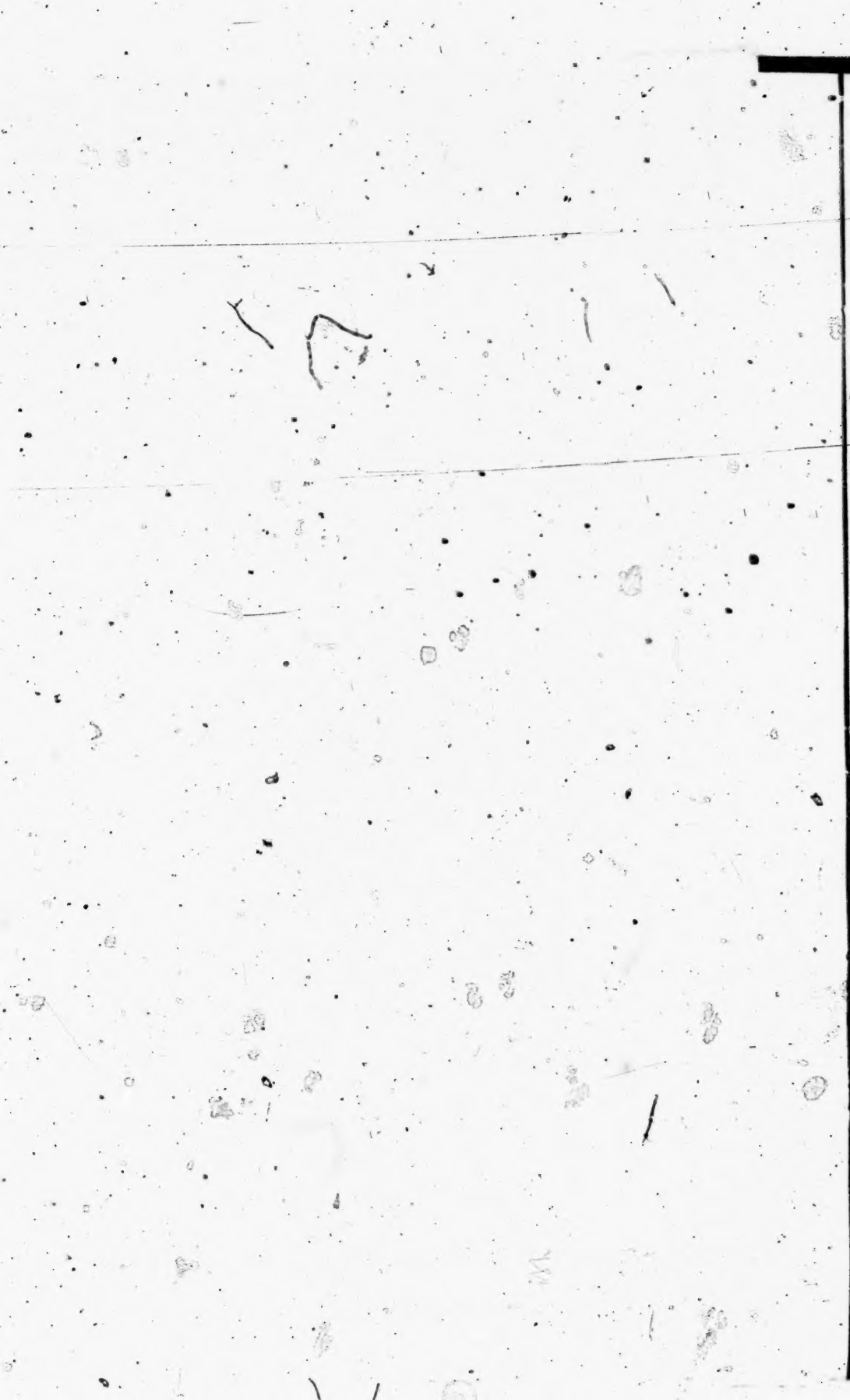

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To the Supreme Court of the United States and the Justices thereof:

Comes now LeTourneau Company of Georgia, respondent in the above-entitled cause, and presents this its Petition for Rehearing, and in support thereof respectfully shows:

I.

Preliminary Statement.

This cause was decided by this Court April 23, 1945, in a joint opinion with *Republic Aviation Corporation* v. *National Labor Relations Board* No. 226. On May 11, 1945,

Mr. Justice Reed issued an order in this cause extending the time within which to file a Petition for Rehearing to and including May 25, 1945.

II.

Under This Opinion Employers are Unreasonably Deprived of Their Right to Protect Property.

The effect of this decision in the *LeTourneau* case, whether intended or not, is to strike down almost any and every rule, howsoever reasonable, adopted by industry for policing its property and that of its employees. Up to now employers had the assurance, so long as they avoided discrimination against union activity, that they were free to adopt and enforce reasonable regulations necessary to protect such property. By virtue of the decision concerning which rehearing is requested, employers no longer have this assurance.

III.

The Joint Consideration of the LeTourneau Case with the Republic Case was Prejudicial to Respondent.

The rule in the *Republic* case provided:

> "Soliciting of any type cannot be permitted in the factory or offices."

The rule enforced in the *LeTourneau* case was as follows:

> "In the future no Merchants, Concern, Company or Individual or Individuals will be permitted to distribute, post or otherwise circulate handbills or posters, or any literature of any description on Company property without first securing permission from the Personnel Department."

It is respectfully urged that respondent's case was considered in an unfavorable light and without adequate regard for the particular facts and circumstances pertaining to it by virtue of the commingling of the two cases which

are fundamentally dissimilar. Throughout the opinion the *Republic* and the *LeTourneau* cases are considered alike and as though involving similar controlling facts and principles with the inevitable result that respondent has not had the benefit of completely independent judgment on the special facts and circumstances of its own case.

In the *Republic* case the employer enforced a rule, all-inclusive in character which proscribed *any type of solicitation*. Its very brevity demonstrates its expanse and the fact that it admitted of no exceptions. The rule in the *Republic* case is of such breadth and coverage that it prohibits any and all types of union activity within the plant looking toward the formation of or acquisition of membership in a labor organization. Solicitation, of course, can be by the spoken word, the distribution of printed matter, the wearing of insignia, and indeed by mere gesture. An absolute ban against solicitation such as is involved in the *Republic* case, whether so intended or not, is an effective block and an insuperable barrier to any reasonable effort on the part of an employee or anyone else to interest another in union activity or membership. Such a rule would clearly be violated if during lunch period, at the work bench, in a rest room, or anywhere else on company property a union member inquired of a fellow employee if he would consider joining his union organization, or if he made overtures of any kind with the purpose of attempting to influence him in that direction. Clearly this is an altogether different proposition from the rule considered in the *LeTourneau* case, and the commingling of these two cases by this Court as though they involved comparable facts and principles of law prejudiced respondent's case and put it in a false light.

The *LeTourneau* case involves application of a rule admittedly promulgated for the bona fide purpose of preventing pilfering and littering. As applied it prevented only the distribution and posting of handbills, posters, or other literature, either in the company's plant or in two parking lots maintained and guarded for the benefit of employees.

This rule in no way abrogates the union's right to solicit or carry on organizing efforts in the plant or on the parking lots. It is by no means the type of all-inclusive ban found obnoxious by this Court in the *Republic* case. It does not go beyond the purpose for which it was originated. Solicitation by union organizers is certainly not proscribed thereby. This rule does not prevent word-of-mouth solicitation or discussion concerning organizational matters, the wearing of union buttons, or any other insignia considered useful for the purpose of promoting a labor union or self-organization by employees, and indeed there is nothing in the rule which would prevent the making of public speeches by union organizers or even the use of loud-speakers on the very premises where the rule against littering and pilfering was enforced. These facts and circumstances, we submit, are entirely unrelated to the all-inclusive "No Solicitation" rule involved in the *Republic* case, and the Court's consideration of the two cases as though they related to the same thing was erroneous and prejudicial to a fair consideration of the *LeTourneau* case.

IV.

The Court Erred in Presuming Respondent Guilty of Unfair Practices in the Absence of Special Circumstances.

The Court erred in relying on the presumption that once the basic facts were proven the employer was guilty of an unfair labor practice under the provisions of the National Labor Relations Act in the absence of evidence by the employer overcoming or rebutting this presumption. In its decision in this case, the Court, after finding that the employer had in good faith and with non-discriminatory purposes promulgated and enforced the rule against distribution and posting of handbills, posters, or any literature, found that it could not * * *

> "* * * properly be said that there was evidence or a finding that the plant's physical location made solici-

> tation away from company property ineffective to reach prospective union members. Neither of these (referring to the *Republic* and the *LeTourneau* cases) is like a mining or lumber camp where the employees pass their rest as well as their work time on the employer's premises, so that union organization must proceed upon the employer's premises or be seriously handicapped."

In other words, the Court has clearly held that in adopting and applying the rule against distribution the company acted in good faith and that there was no proof of any special circumstances indicating that the adoption of the regulation would result in discrimination against union organization and activity. In spite of this, the Court found that the mere adoption of the rule violated the Act.

Under these circumstances, the National Labor Relations Act does not create or permit the creation of the presumption that the employer's conduct constitutes an unfair labor practice. The Court has erroneously placed the presumption of guilt on the employer from the mere recital of the basic facts, and has held the employer guilty of unfair labor practices, not because of the presence of special circumstances showing discrimination but because of the alleged absence of special circumstances proving non-discrimination. The Court said:

> "The *LeTourneau Company of Georgia* case also is barren of special circumstances."

We believe that in reaching this conclusion the Court has erred both in law and fact. We respectfully urge that the presumption of innocence must attend the promulgation and operation of the rule, and that even if this were not so special circumstances of a controlling nature showing non-discrimination are contained in the record in this case.

Under the authorities it is clear that the presumption of non-violation obtains and the burden is on the accuser to prove discriminatory effect. If the statute required a con-

trary result, to that extent it would violate the Fifth Amendment to the Constitution. This Court in *Western and Atlantic Railroad* v. *Henderson, et al.*; 279 U. S. 639, 642, in dealing with a state enactment, said:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

The Courts have uniformly agreed that the Act does not permit of the creation of a presumption against the employer; rather the presumption is that the employer has not violated the Act. *National Labor Relations Board* v. *Union Manufacturing Company*, 124 F. (2d) 332; *Interlake Iron Corporation* v. *National Labor Relations Board*, 131 F. (2d) 129. In the latter case at page 134 the Seventh Circuit Court said:

> "The company does not have to prove non-discrimination because of union activities. The Board must prove discrimination because thereof. This burden of the Board to prove discrimination and to prove that discrimination was employed in the hiring or firing of a man because of his union activities does not shift from the Board."

Something entirely different was involved in the *Peyton Packing Company* case, 49 N. L. R. B. 828, referred to by the Court in its opinion. There the Board with propriety held that while it was presumed that a rule prohibiting union solicitation during working hours is valid in the absence of evidence shewing a discriminatory purpose, the contrary would be presumed where the employer promulgated and enforced a rule prohibiting union solicitation by an employee outside of working hours although on company property. Implicit in the adoption of such a rule is a purpose to discriminate against proper union activity

whether such purpose was intended or not in the promulgation of the rule. However, by no stretch of the imagination is this the *LeTourneau* case nor does the rule resemble that which is the subject of attack in the instant case. It having been found that the *LeTourneau* rule was adopted for a valid non-discriminatory purpose, the respondent should not be found guilty of discrimination on a record barren of even a scintilla of evidence that the actual adoption and application of this rule did in fact discriminate.

V.

In any Event the Record is Replete with Evidence of Special Circumstances Showing Non-Discrimination.

However, in any event the record is replete with proof of facts and special circumstances showing that the rule was not discriminatory and which completely rebut such a presumption, if it can be indulged in any case. Having approved the Board's application of a presumption that the enforcement of this rule against circulation of union literature on the two parking lots was a violation of Section 8 (1) and Section 8 (3) of the Act this Court then proceeded on the assumption that the record was barren of special circumstances which conceivably would have overcome the presumption. This error is manifest by the statement found in the Court's opinion to the effect:

> "• • • There is one hundred feet of company-owned land for parking or other use between the highways and the employee entrances to the fenced enclosures where the work is done, so that contact on public ways or on non-company property with employees at or about the establishment is limited to those employees, less than 800 out of 2100, who are likely to walk across the public highway near the plant on their way to work, or to those employees who will stop their private automobiles, buses, or other conveyances on the public roads for communications. The employees' dwellings are widely scattered."

There are other facts, apparently not considered by the Court, which do overcome and rebut such presumption, if it should be indulged at all. Some of these are:

1. Practically all of the employees enter and leave the company's plant through a main gate approximately 100 feet from the intersecting highway. All employees, including the 800 referred to by the Court who worked in the foundry, enter and leave the main gate and punch a time clock located just inside the gate. (R. p. 56, 58). Aside from the opportunity openly to solicit and other means afforded union workers to distribute literature to the company's employees, they had the opportunity to hand out their literature to employees just before they entered this gate as is conclusively shown by the testimony of the witness Haynes, who in reply to the question "—has the Company within your knowledge attempted to interfere with the distribution of Union literature out on the highway, or near the highway immediately in front of the plant?"—said: "No, there has been no interference with that. That goes on, absolutely." And further stated: "I have been in the bus or in a car when it was handed out, yes, without any interference or restriction whatsoever at that point." (R. p. 49).

2. There was no rule against solicitation and the rule against distribution of literature was not applied to any area outside of the plant and the two company-maintained parking areas. (R. p. 49).

3. Available at all times to union organizers for the distribution of their literature was the United States Post Office located within the very heart of the premises. (R. p. 54).

4. Distribution of literature was unrestricted at a gasoline filling station directly across the highway from the plant and adjacent to the south parking lot. (R. p. 49, 54).

5. Prior to the adoption of the rule and at a time when there was no union activity at the plant, a guard was hired by the company to protect its property and the property of its employees. That guard requested the promulgation of the rule. (R. p. 80).

6. Prior to its adoption the guard received almost daily reports of thefts of such items as cameras, cigarettes, lunches, spare tires, tools, and jacks from the employees' cars parked on the lot and one complaint involved the theft of an automobile. (R. p. 80).

Surely when consideration is given to these facts and the perfectly valid and reasonable purpose behind the promulgation and enforcement of this rule, especially in view of the fact that it protected the property of the employees, and promoted efficiency, by relieving the minds of such employees while at work from anxiety concerning their belongings, necessarily left in their automobiles, it cannot be said that the rule was improperly restrictive or that it substantially encroached upon any valid right of the employee, or in any way violated any provisions of the Act.

Conclusion.

The conduct of the LeTourneau Company in no sense violates the purposes of the Wagner Act. As this Court has held, the company acted without discrimination toward union organization both in the adoption of its rule and the enforcement thereof. Beyond this the Court has before it affirmative evidence demonstrating that neither the promulgation nor the application of the rule would in fact discriminate against proper union activities. While it may be true that the circumstances in the *Republic* case warranted a finding that the Act was violated, it is respectfully submitted that the facts and circumstances here do not warrant such a finding and that this Court should give independent consideration to the *LeTourneau* case, its facts and circum-

stances, and order rehearing thereon; otherwise, a result entirely foreign to the intentions of the authors of the National Labor Relations Act will be produced.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and that the judgment of this Court be upon further consideration reversed.

Dated: May 25, 1945.

Respectfully submitted,

ALONZO C. WHEELER,
NELSON T. HARTSON,
LESTER COHEN,
CLIFTON W. BRANNON,
C. M. MCCLURE,
Counsel for Respondent,
LeTourneau Company of Georgia.

Of Counsel:
HOGAN & HARTSON,
810 Colorado Bldg.,
Washington, D. C.

Certificate of Counsel.

I, Counsel for the above-named respondent, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for delay.

NELSON T. HARTSON,
Counsel for Respondent,
LeTourneau Company of Georgia.